

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matters of)

Imposition of Forfeiture Against Capitol
Radiotelephone Inc. d.b.a. Capitol Paging
Former Licensee of Station WNSX-646 in
the Private Land Mobile Radio Services;)

PR Docket No. 93-231

and)

Revocation of Licenses of Capitol
Radiotelephone, Inc. d.b.a. Capitol Paging
Licensee of Station WNDA-400 in the
Private Land Mobile Radio Services, et al.)

To: The Review Board

PRIVATE RADIO BUREAU'S EXCEPTIONS

Preliminary Statement

1. The Private Radio Bureau (PRB), pursuant to Sections 1.276 and 1.277 of the Commission's Rules, hereby submits its exceptions to the Initial Decision of Administrative Law Judge Joseph Chachkin, 9 FCC Rcd ____ (released October 31, 1994) ("ID").

Statement of the Case

2. By Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing, 8 FCC Rcd 6300 (1993) (HDO), the Commission designated the above-captioned private land mobile radio station application and licenses of Capitol Radiotelephone Inc. and Capitol Radio Telephone Inc. d.b.a. Capitol Paging (Capitol) for hearing in a consolidated proceeding upon the issues specified therein. The ID found in favor of Capitol in all respects on all specified issues, and concluded that "there is no justification for revoking any of Capitol's licenses or for imposing a forfeiture." (ID at para. 115.)

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Summary

1. The Initial Decision (ID) that forfeiture or revocation was not warranted against Capitol is contrary to the evidence and must be reversed. The ID's ruling in Capitol's favor is based on numerous errors of law and fact, including: (1) use of an incorrect legal standard to determine whether Capitol's violative behavior was "willful," in contravention of the Hearing Designation Order (HDO) and Commission precedent; (2) erroneously ruling that occupancy of a shared channel for inordinately long periods does not constitute interference; (3) discounting compelling evidence of violations by Capitol offered by two experienced Commission field engineers based on monitoring and direct observation of Capitol's operation; (4) discounting the testimony of RAM's principals as biased, despite the fact that it was corroborated by the Commission engineers, while accepting the uncorroborated testimony of Capitol's principals and its long-time paid consultant; (5) erroneously concluding that Capitol's common carrier paging system did not compete with RAM's private carrier system despite the HDO's finding to the contrary; (6) erroneously concluding that RAM's use of an "inhibitor" mitigates the charge of willful interference, again in contravention of the HDO; (7) not requiring Capitol to produce its president and owner as a witness, despite the fact that he was available to testify and possessed relevant information not otherwise available in the proceeding; and (8) erroneously denying the parties' Joint Motion to Accept Consent Agreement, which would have settled this matter prior to hearing.

2. Separate and apart from the issues designated for hearing by the Commission, the ID also erroneously criticizes PRB and its staff for alleged bias against Capitol and favorable treatment of RAM. The record provides clear evidence that PRB acted in an even-handed

manner: (1) PRB granted Capitol's license application notwithstanding RAM's complaints; (2) upon receiving complaints from both Capitol and RAM, PRB admonished both parties to avoid interference with one another or they would face appropriate sanctions; (3) PRB handled RAM's subsequent complaints according to normal procedures, while Capitol unilaterally chose not to pursue any further complaints it may have had. The ID also erroneously accuses PRB of ignoring violations by RAM. The ID's conclusions in this respect go far beyond the scope of the record and improperly rely on testimony regarding RAM that was not admitted for the truth of any matter, but would have been challenged had it been so admitted. The ID's conclusions regarding PRB bias should therefore be stricken.

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Questions Presented

- I. Whether the Initial Decision applied an improper standard for willful interference.
- II. Whether Capitol engaged in willful interference against RAM.
- III. Whether PRB showed bias against Capitol and gave RAM preferential treatment.
- IV. Whether the Presiding Judge erred in denying the Joint Motion for Approval of Consent Agreement filed by all parties.

Argument

I. The Initial Decision Applied An Improper Standard For Willful Interference

A. Intent To Interfere Not Required

3. The ID acknowledges that there were instances in which Capitol's transmissions directly interfered with RAM's transmissions, but concludes that these cannot constitute "willful" interference unless the evidence demonstrates that Capitol actually intended to interfere with or obstruct RAM's transmissions. (ID at paras. 80-81.) This standard is erroneous as a matter of law and contradicts the Commission's finding on this issue in the HDO. With respect to revocation, 47 U.S.C. § 312(f) plainly states: "'willful' ... means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate" the Act or Commission Rules. The legislative history is consistent with the plain language of the statute: "[W]illful means that the licensee knew he was doing the act in question, regardless of whether there was an intent to violate the law."¹ In Southern California Broadcasting Company, 6 FCC Rcd 4387 (1991), the Commission explicitly applied this standard of "willfulness" to forfeitures under 47 U.S.C. § 503 as well. In the

¹ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

HDO, consistent with the plain language of 47 U.S.C. § 312 and its own ruling in Southern California Broadcasting, the Commission rejected Capitol's contention that willfulness for revocation or forfeiture requires proof of intent to interfere, stating:

For purposes of revocation under Section 312(a) (or a forfeiture under Section 503(b)) of the Act, . . . establishing that a violation of the Act or the rules is willful does not require us to establish that the licensee knew he was acting wrongfully; but only that the licensee knew that he was doing the acts in question. Willful (and/or repeated) interference constitutes justification to impose sanctions, including revocation, without the need to establish a "deliberate attempt" to interfere. (HDO at para. 11, citing Southern California Broadcasting Company, supra, and Raymond C. Standring, 68 FCC 2d 1021, 1023 (1978) (emphasis added).)

The Presiding Judge does not have the latitude to ignore or contradict this standard. Thus, PRB was required to prove only two elements to establish willful interference: (1) that interfering transmissions occurred, and (2) that Capitol knowingly caused the transmissions. Since PRB established both of these elements, as the ID acknowledges, the Presiding Judge erred as a matter of law in failing to find willful interference by Capitol.² Moreover, because Capitol took the actions involved and repeated these actions over more than one day, these violations were willful and repeated.³

B. "Walking" on Another Transmission Not Required

4. The ID also concluded that "excessive" testing, i.e., unnecessarily prolonged use of a paging channel to send test transmissions, does not constitute "harmful interference" because it does not involve actual "jamming" of or "walking" on another licensee's transmissions. (ID

² The Commission has always considered willful interference a serious and egregious offense. Harold R. Claypoole, 95 FCC 2d 331, 335 (1983).

³ MCI Telecommunications Corporation, 3 FCC Rcd 509, note 22 (1988); see also Hale Broadcasting Corp., 79 FCC 2d 169 (1980).

at paras. 84-86.) The ID's conclusion that "jamming" or "walking" must be found is based on a misreading of both Henry C. Armstrong, 92 FCC 2d 485 (Rev. Bd. 1983), and Gary W. Kerr, 91 FCC 2d 107 (Rev. Bd. 1982). (ID at paras. 59 and 86). In Armstrong, the Review Board found that a licensee who "deliberately monopolized the frequency for prolonged periods of time" was guilty of interference. (Armstrong, supra, at p. 489). In Kerr, the Review Board defined "jamming" as "repeatedly transmitting a continuous message" so that other licensees are unable to gain access to the channel. (Kerr, supra, at p. 108). Thus, both cases support the proposition that prolonged use of a channel for purposes other than legitimate messaging or testing may constitute "harmful interference" whether or not it occurs "on top" of transmissions by the other licensee.

II. The Initial Decision Erroneously Concluded That Capitol Did Not Engage In Willful Interference

A. The Evidence Shows Capitol Was Operational as of November 1990

5. On the issues of whether Capitol caused interference to RAM, engaged in improper testing, or transmitted for purposes other than paging between November 15-18, 1990 (HDO, Issues a, c and f), the ID accepts Capitol's contention that its PCP station was not yet operational at this time. (ID at paras. 19, 69, 92, 101.) This conclusion is inconsistent with the record and should be reversed. The Presiding Judge bases his conclusion solely on the uncorroborated written direct testimony of J. Michael Raymond, Capitol's Vice President and Chief Operating Officer, that the station was not operational. (CAP-1 at p. 22).⁴ Yet this

⁴ Billy McAllister, a technician employed by Capitol's service company, indicates that he installed and maintained the PCP station (CAP-21 at p. 1), but does not recall the precise date of installation. (Tr. 647-8).

statement is contradicted by Raymond's own sworn statement at the time in response to RAM's initial allegation of interference. (CAP-11). In that statement, dated December 4, 1990, Raymond did not deny that Capitol's PCP station was operational, but merely denied that Capitol was interfering with RAM. If Capitol was in fact not operating in November 1990, it is inconceivable that Raymond would have failed to mention this. Because this statement is contemporaneous with the events in question, while Raymond's self-serving later statement is not, the prior statement should be given greater weight and it should be presumed that Capitol's station was operating during the period November 15-18, 1990.

B. FOB Found Clear Evidence of Interference in August 1991

6. Notwithstanding the clear evidence of interference provided by FOB field engineers who monitored Capitol's transmissions during the period August 12-15, 1991, the ID concludes that no willful interference occurred during this period. This finding flies in the face of the factual record and should be reversed.

7. The FCC field engineers' observations provide impartial, first-hand evidence of Capitol's interference: On Monday, August 12, FCC field engineers monitored 152.480 MHz near RAM's and Capitol's transmitter sites. (Tr. 111-2, 252.) They detected transmissions, which were conclusively traced to Capitol, consisting of a repeated sequence of identical tones, but no message. (PRB-3 at pp. 2-4; Tr. 112-4, 252-5.) The engineers continued to hear this sequence of tones each time they listened to 152.480 MHz throughout the week (Tr. 114, 136-7, 255-6, 1338-42), and they never heard Capitol transmit anything other than these tones. (Tr. 139, 254.) On several occasions, the engineers also observed that these transmissions were "walking on" RAM's transmissions. (PRB-3 at pp. 1-2; Tr. 275.)

8. After monitoring the channel, the engineers inspected Capitol's premises in Charleston. They continued to hear the tones up to the time that they arrived for the inspection (Tr. 115, 255-6), at which point the tones ceased abruptly. (PRB-3 at p. 3; Tr. 256, 258, 275, 290-1, 1442). FCC field engineer Walker indicated that, based upon his experience, the duration of the tones was too long to reflect legitimate testing. (Tr. 112.) He stated that he did not consider what he heard to be testing, and that he had never heard testing of such duration. (Tr. 137-8, 1443, 1463.)

9. In response to the engineers' queries at the inspection, William D. (Dan) Stone, Capitol's president, claimed that Capitol was testing to determine coverage of the paging system. (PRB-3 at p. 3.) Stone could not identify anyone receiving the pages, however, despite the fact that such testing normally requires people with pagers in the field to verify successful receipt of the test transmissions. (PRB-3 at p. 3; Tr. 142, 1144-1445.) The Commission engineers also observed that the test function of Capitol's equipment at the Charleston site was disabled. (PRB-3 at p. 3.) Bob Wilson, Capitol's office manager, told the engineers that the transmissions originated in Capitol's Huntington facility. (PRB-3 at p.3; Tr. 1446.) Wilson then attempted to establish a manual connection with Huntington by modem so that the Commission engineers could view data concerning the pages. (PRB-3 at p. 3; Tr. 1446-7.) The connection was made but was broken at the Huntington end almost immediately. (PRB-3 at p. 3.) Upon reconnection, the Huntington terminal test function was disabled and there was no test pager number displayed. (PRB-3 at p.3.) The pager numbers, repeat functions, and chaining functions had all been deleted, and all the variables that need to be entered for testing purposes were black. (Tr. 1442, 1448.)

10. Because several deliberate steps are required to delete all of this information, Walker believed Capitol's personnel were attempting to hide something from the FCC field engineers. (Tr. 1454-5.) At this point there was no Capitol paging activity, and Capitol's transmission of tones had ceased. (PRB-3 at p. 3; Tr. 256). Moreover, Raymond could provide no credible reason for any testing at that time, and appeared to be extremely evasive. (Tr. 1311-7, 1418-20.) When asked to support his claim of testing by explaining who was receiving the transmissions and how, Raymond was equally evasive. (Tr. 1318-19.)

11. Notwithstanding the suspicious nature of the facts revealed by the inspection, the Presiding Judge entirely discounted Walker's opinion that Capitol had engaged in "excessive" testing on the grounds that Walker was not an "expert" on paging. Instead, the Presiding Judge concluded that Capitol's testing activities were legitimate based solely on the testimony of Arthur K. Peters (ID at paras. 83, 97), Capitol's long-time paid consultant (CAP-23 at p. 4). The decision to completely disregard Walker's testimony on this basis is unsupported by the record, especially since Walker was testifying as to his own first-hand observations. Although Walker testified that he did not hold himself out as an expert on the paging industry (Tr. 150), the record nevertheless demonstrates that Walker was a highly qualified field engineer with 18 years of Commission experience in enforcing radio-related rules and regulations, monitoring and investigating interference complaints, and helping to identify and resolve interference problems. (Tr. 108-109.) When PRB requested that FOB monitor and inspect the stations involved in this case, FOB chose Walker as qualified for the assignment.

12. The record further reflects that Walker's conclusions regarding Capitol's activities were based on careful monitoring, identification, and evaluation of Capitol's transmissions.

(Tr. 110-114, PRB-3.) When this evaluation revealed discrepancies, the engineers followed up with Capitol's personnel to determine whether these discrepancies could be explained. (Tr. 114-119, PRB-3.) Walker based his conclusion that Capitol's explanation was inadequate on careful review of the facts and circumstances and questioning of principals. In addition, Walker is an impartial witness, in contrast to Peters, the "expert" witness upon whose testimony the ID relies. Far from being a neutral expert rendering an impartial opinion, Peters had a long-standing consultant/client relationship with Capitol, which included being associated with Capitol in previous cases. (CAP-23 at page 4.) The ID makes no mention of this relationship in evaluating Peters' testimony, despite its obvious relevance to issues of credibility and bias. Consequently, the ID's findings regarding the testimony of Walker and Peters should be overturned.

C. Capitol Did Not Take Reasonable Precautions to Prevent Interference

13. The ID concludes that Capitol's use of an "inhibitor" to monitor the channel before transmitting constituted a "reasonable precaution" against interference under Section 90.403 of the Commission's rules, thus precluding a finding of willful interference. (ID at paras. 82, 96.) This conclusion is erroneous and must be reversed. First, the Commission determined in the Hearing Designation Order that the existence of Capitol's inhibitor "does not mitigate the charge of harmful interference." (HDO at para 12.) The Presiding Judge did not have the latitude to contradict the HDO in this regard. Second, the ID erroneously concluded that Capitol's efforts to monitor the channel constituted sufficient precautions to preclude a finding of willful interference. In fact, the rule requiring licensees to take reasonable precautions to avoid interference refers to "monitoring the transmitting frequency

for communications in progress and such other measures that may be necessary to minimize the potential for causing interference." 47 C.F.R. § 90.403(d) (emphasis added).⁵ Thus, if interference occurs notwithstanding monitoring, the licensee must take additional precautions.⁶ The ID erroneously failed to apply this standard. Capitol claims that it took precautions, but the field engineers observed interference. Given that monitoring the channel was insufficient to prevent the interference, Capitol was reasonably required to take additional precautions, which it failed to do. Thus, the ID's finding of reasonable precautions should be reversed.

D. The Initial Decision Erroneously Concluded That Capitol Had No Competitive Motive to Interfere With RAM

14. In the face of overwhelming evidence that Capitol and RAM were in direct competition with one another, the Presiding Judge concluded that Capitol had no competitive motive to interfere with RAM's operations. (ID at paras 57-58.) The stated basis for this conclusion is that RAM's private carrier paging (PCP) system served a different market "niche" from Capitol's common carrier system. (ID at para. 57.) Thus, according to the ID, Capitol would gain no competitive benefit from RAM's being unable to serve its customers. This finding contravenes the HDO, the evidence, and marketplace realities.

⁵ Memorandum Opinion and Order, Petition for review and supplement to the petition for review of delegated authority which denied action on a complaint filed by Lee Richter d/b/a Nu-Page of Winder against Digital Paging Systems of Georgia, Inc., 6 FCC Rcd 7565, 7566 (1991).

⁶ Indeed, the Commission has held licensees to be responsible for harmful interference where FOB observed interference even though a state-of-the-art monitoring system was in place. Id. See also Texidor Security Equipment, Inc., 4 FCC Rcd 8694, 8696 (1989), in which the Commission found that "operation in a manner that constantly causes harmful interference without interruption is prima facie evidence of failure to comply with Section 90.403(e)."

15. In the HDO, the Commission expressly found that Capitol's common carrier paging operations competed with RAM's private carrier paging operations in Charleston and Huntington, West Virginia. (HDO at paras. 2 and 13.) The Commission referred to Capitol and RAM as competitors "in the provision of paging services" without anywhere suggesting that PCP and common carrier paging systems serve different market "niches." The Commission further stated that because of this competitive relationship, Capitol could well have the very incentive to interfere with RAM that the ID concludes is not possible, i.e., Capitol "sought to degrade RAM's quality of service so that RAM's customers would take paging service from Capitol" instead. (HDO at para. 13.)

16. The Presiding Judge does not have the latitude to contravene the HDO on the existence of competition between Capitol's common carrier system and RAM's PCP system. Yet the ID ultimately concludes that RAM and Capitol do not compete by characterizing RAM's PCP system as serving a "niche" market for low-cost paging while Capitol serves a different "niche" for high-cost services. This conclusion contradicts the HDO, contradicts other Commission precedent, is internally consistent with other conclusions of the ID, and is inconsistent with economic reality. The Commission has recognized that PCP and common carrier paging systems are not only competitive with one another, but are virtually indistinguishable from the end user's point of view.⁷ Indeed, the ID itself states that "[t]he only major difference between PCP and RCC systems is the requirement that PCP operations share their channels with each other." (ID at para. 9.) The ID therefore errs in suggesting

⁷ See, e.g., Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411, 1453 (1994) ("there are no longer any real differences between private carrier and common carrier paging systems").

that because RAM and Capitol do not provide identical paging services at identical rates, they are not in competition with one another. To the contrary, Capitol's own actions show that it viewed itself as in competition with RAM. It advertised its own RCC services as "guarded" but referred to PCP services as "party line" (Tr. 854-860) to demonstrate that "a RCC frequency is superior to a private carrier frequency" (Tr. 859). Raymond testified that he has explained to RAM customers "the difference between a private carrier and an RCC" as "part of our (Capitol's) marketing." (Tr. 840.) Paging customers viewed RAM's and Capitol's services as competitive with one another. A rise in price or decline in quality of one licensee's service would inevitably make the other licensee's service more attractive. Capitol therefore had ample motive to interfere with RAM's operations in order to deprive subscribers of a lower-cost alternative and to prevent erosion of its own common carrier subscriber base.

17. Further evidence of Capitol's anti-competitive motive is provided by Capitol's own conduct. The record establishes that Capitol operated on RAM's PCP frequency for over one and a half years, yet (1) Capitol had few, if any, identifiable customers on the frequency during most of this period,⁸ and could never point to a time when it had more than 22 customers, according to its own witnesses (Tr. 1416-17); (2) Capitol transmitted so-called "testing" signals on a continuous basis that stepped on RAM's transmissions or occupied the channel for unusually prolonged periods (ID at para. 78); (3) when questioned by the Commission's engineers, Capitol could not document its testing activities, suddenly ceased the

⁸ From 1991 to 1992, Capitol, when asked for documentation, provided customer lists indicating 3-5 customers with one pager number each (PRB-3 at p. 5; PRB-5; Tr. 985-6; Tr. 1381-3). Later, in its June 17, 1992, response to a Commission inquiry, Capitol listed 2 customers as of the time of the inspection (PRB-10; PRB-11 at p. 3).

transmissions, and "reconstructed" what they were doing for the engineers (PRB-3); and (4) Capitol used the channel on other occasions to transmit "dummy" messages that duplicated transmissions on its common carrier system (Tr. 74-76, 284-5, 291, 306-7, 321, 360-1, 374-5, 467-8 and 487-8). The ID strains to explain these actions as resulting from "technical" problems afflicting Capitol's PCP system (see, e.g., ID at paras. 32-33), yet the overall pattern of conduct cannot be ascribed to technical problems alone. The ID's finding regarding Capitol's lack of motive is also inconsistent with its view of RAM's motives: the ID concludes that Capitol had no competitive motive to interfere with RAM (ID at paras. 57 and 58), yet it assumes that fear of competition motivated RAM's efforts to prevent Capitol from using RAM's PCP channel (ID at para. 60). The ID cannot have it both ways. It is illogical to conclude that conduct that could cause competitive harm to RAM would not also confer a competitive benefit on Capitol. The ID's finding should therefore be reversed.

E. Capitol's Explanations Are Self-Contradictory and Not Credible

18. The ID fails to account for numerous instances in which Capitol's responses to allegations of interference were inconsistent and inherently incredible, all the more so when taken together. When confronted in November 1990 with apparent retransmissions by Capitol of common carrier messages on PCP frequencies, Raymond first denied that Capitol made such transmissions (CAP-11 at pp 2-3), and later claimed that Capitol had not been operational at this time. (CAP-01 at p. 22; Tr. 813-814, 1013, 1303-1304.) In response to later allegations of interference, including those observed by FCC engineers in 1991, Raymond claimed to have no explanation, stating, "if [the FCC engineers] couldn't figure it out...don't expect me to figure it out." (Tr. 1340.) Peters offered the theory that the apparent

interference could be the result of intermodulation (Tr. 1095-9), but FCC engineer Walker disagreed. (Tr. 1458, 1482-4.) Finally, when RAM documented additional instances of "dummy" messages in 1992, Raymond and Peters suggested that these were the result of "sabotage" by an unknown third party. (Tr. 117-118, 815-818.)

19. The ID erred in giving credence to Capitol's strained and inconsistent explanations over the far more plausible testimony of other witnesses, including FCC field engineers, which refutes these explanations. For instance, the ID accepted Capitol's intermodulation theory based on the testimony of Capitol's paid consultant, Peters, ignoring the testimony of an impartial Commission engineer, Walker, that intermodulation could not have been the cause. Moreover, as for Capitol's unexplained and uncorroborated claims of "sabotage," the simple fact is that the retransmission of Capitol's common carrier traffic on a PCP channel could only have been caused by Capitol. (Tr. 452, 455.)

F. The Presiding Judge Erred In Favoring Uncorroborated Testimony of Capitol Witnesses Over Corroborated Testimony of RAM Witnesses

20. The ID's findings in favor of Capitol are based almost exclusively on the testimony of two Capitol-related witnesses: J. Michael Raymond, Capitol's Vice President and Chief Operating Officer, and Arthur K. Peters, who had been Capitol's long-time paid consultant. By contrast, the ID summarily discounts the testimony of all four RAM-related witnesses, Robert Moyer, Jr., A. Dale Capehart, Luke Blatt, and Raymond Bobbitt, on virtually every issue in the case. The rejection of their testimony is based on (1) bias and (2) the Presiding Judge's conclusion that the RAM witnesses were evasive and prone to "exaggeration, if not outright fabrication," in their testimony. (ID at para. 66.)

21. Although the trier of fact's findings concerning the credibility of witnesses are not disturbed lightly, the Review Board may exercise de novo review⁹ and reverse credibility findings where warranted.¹⁰ Such reversal is warranted in this case. First, the ID cites bias as grounds for discounting the testimony of RAM witnesses while ignoring identical grounds for finding bias in the testimony of Capitol's witnesses. Second, the ID dismisses the entirety of RAM's testimony as exaggerated or fabricated. The ID does this even though FCC field engineers corroborated the testimony of RAM's witnesses, but not the contrary testimony of Capitol's. In this regard, the finding of the ID at note 8 that "No evidence from a disinterested witness corroborating RAM's charges has been offered" is clearly inaccurate.

G. The Presiding Judge Erred in Not Allowing PRB to Call Stone as a Witness

22. On January 25, 1994, PRB requested that Capitol produce William D. (Dan) Stone, Capitol's president, for cross-examination at the hearing. The Presiding Judge denied PRB's request. (Tr. 43-46, 1011, 1039-58.) This constituted error. As the president and (with his family) the owner of Capitol (Tr. 820), Stone was obviously a material witness with respect to numerous issues in this case.¹¹ In particular, Stone was present at the inspection of Capitol's station by the Commission's engineers and was one of the principals who responded

⁹ See, e.g., In the Matter of Allnet Communications Services, Inc., 8 FCC Rcd 5629 (1993); In re Applications of Fenwick Island Broadcast Corp., et al., 7 FCC Rcd 2978 (1992); In re Applications of Mableton Broadcasting Company, Inc., et al., 6 FCC Rcd 396, n. 7 (1991); and In re Application of Tri-State Broadcasting Co., Inc., et al., 5 FCC Rcd 3727 (1990).

¹⁰ See, e.g., In re Applications of Gulf Coast Communications, Inc., and Dee Wetmore D/B/A Tampa Radio Marine Service, 81 FCC 2d 499 (1980).

¹¹ The ID notes that Stone did not testify, although it fails to mention the denial of PRB's request to have Stone called as a witness. ID at para. 46 n. 19.

to their inquiries. (PRB-3 at pp. 3, 5; Tr. 131-2, 1450). In addition, the Bureau believed that Stone was the person responsible for preparing the list of Capitol PCP customers discussed in the ID at para. 46.¹² Because PRB had no control over Stone, it properly notified Capitol that it wanted Stone produced for oral cross-examination at the hearing. Moreover, it is evident that Stone was available to testify at the hearing, because Capitol subsequently attempted to offer him as a rebuttal witness.¹³ The Presiding Judge therefore should have required Capitol, as the respondent in control of this witness, to produce him for cross-examination. Alternatively, because Capitol refused to produce Stone voluntarily, the ID should have inferred that his testimony would be unfavorable to Capitol.¹⁴

H. Allegations Of Interference By RAM Against Capitol Are Irrelevant And Immaterial To The Issue Of Whether Capitol Violated The Commission's Rules

23. The ID frequently asserts that (1) RAM deliberately interfered with Capitol's PCP operations, and (2) that the Commission should have brought an action against RAM. (See, e.g., ID at notes 7 and 33.) These assertions, although legally irrelevant to the matter at

¹² In this regard, the ID erred in concluding at note 21 that the Bureau made no effort to ascertain the persons responsible for this list. The record would not reflect this information, and the trier of fact had no way of knowing whether the Bureau had or had not made such an effort. Indeed, the Bureau had made such an effort, and, while its results were not conclusive, the Bureau had reason to believe Stone prepared the list.

¹³ After the Presiding Judge ruled that PRB could cross-examine Stone on any matter if Capitol produced him voluntarily as a rebuttal witness, Capitol chose not to call Stone to the stand.

¹⁴ Lee Optical and Associated Companies Retirement and Pension Trust Fund, 2 FCC Rcd 5480, 5486 (Rev. Bd. 1987), citing WNST Radio, Inc., 70 FCC 2d 1036, 1041 (Rev. Bd. 1978). See also McCormick on Evidence (2d Ed., 1972), Sec. 272, at pp. 656-7 ("where a potential witness is available and appears to have testimony relevant to the case which is not cumulative, and where the relationship with one of the parties is such that the witness would ordinarily be expected to favor that party, the failure to produce the witness gives rise to an inference that the witness's testimony would have been unfavorable").

issue, irreparably tainted the ID's assessment of Capitol's conduct. As discussed below, PRB strongly objects to the ID's assertion that the Bureau showed bias against Capitol and in favor of RAM in its investigation of both parties' interference complaints or the initiation of this proceeding. Nevertheless, assuming for the sake of argument that RAM engaged in conduct against Capitol that would justify Commission action, such conduct is irrelevant to the issue of whether Capitol engaged in harmful interference or otherwise violated the Commission's rules. The possibility that RAM committed violations also does not mitigate or constitute a defense to violations by Capitol. Indeed, while respondents in interference cases frequently attempt to argue that their actions are justified by another party's wrongdoing, the Commission has consistently rejected this "self-help" defense.¹⁵ In Jonathan McFadden, 75 FCC 2d 212, 214 (Rev. Bd. 1979), the Review Board stated: "the Commission cannot tolerate the use of vigilante tactics....," noting that one who uses such tactics becomes part of the problem and aggravates the situation. Accord, James W. Smith, 102 FCC 2d 258, 260 (Rev. Bd. 1985), aff'd 1 FCC Rcd 594 (1986).

III. The Initial Decision Erred In Concluding That PRB Showed Bias Against Capitol Or Gave RAM Preferential Treatment

A. PRB Acted Even-Handedly To Settle the RAM/Capitol Dispute

24. In concluding that Capitol did not violate the Commission's rules, the ID accuses PRB of having accepted RAM's "uncorroborated . . . versions of the facts without question," while Capitol's complaints about RAM "consistently received a deaf ear." (ID at para. 62.)

¹⁵ Kenneth L. Gilbert, 92 FCC 2d 130 (I.D. 1982), aff'd, 92 FCC 2d 126 (Rev. Bd. 1982); Henry C. Armstrong, III, 92 FCC 2d 491, 501 (I.D. 1982), aff'd, 92 FCC 2d 485 (Rev. Bd. 1982); and Gary W. Kerr, 91 FCC 2d 107, 109 (Rev. Bd. 1982).

The ID further states that PRB's approach to the case reflects "uneven treatment" accorded to RAM's and Capitol's complaints. (Id.) In essence, the Presiding Judge accuses PRB and RAM of attempting to block legitimate efforts by Capitol to initiate PCP service on the same channel as RAM. The Presiding Judge's harsh criticism of the Commission professionals involved in this matter constitutes a serious distortion of the record. As discussed below, PRB has acted even-handedly throughout this matter and has not treated Capitol unfairly.

25. The ID initially focuses on RAM's efforts before the Commission to defeat Capitol's application for a PCP license on the shared channel occupied by RAM. Although the Presiding Judge is highly critical of RAM's filing of a Petition to Deny against Capitol and its enlistment of a Member of Congress to lobby the Commission, the fact is that PRB acted appropriately and in conformance with well-established policy in responding to RAM.¹⁶ While formal Petitions to Deny are not allowed against private radio applications (ID at para. 12), PRB routinely treated such petitions as informal objections, as it did here. (CAP-06). Even more to the point, PRB overruled RAM's objections to Capitol's application, and affirmed this decision even after RAM enlisted Congressman Perkins to press its cause. PRB's grant of Capitol's license over RAM's objections was obviously not an instance of PRB accepting "uncorroborated" accusations by RAM or turning a "deaf ear" to Capitol. The ID offers no plausible explanation of why PRB would be biased against Capitol's operation on the shared PCP channel after granting Capitol its license on that channel in the first place.

¹⁶ The Presiding Judge improperly imputes bad faith to RAM for exercising its legal rights to challenge Capitol's application to operate on a shared channel. The fact that the Commission's rules require sharing of the frequency does not preclude a licensee from questioning whether a co-channel applicant has a legitimate need for the channel or whether an alternate channel might be more appropriate.